COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

KEYSTONE RELEAF, LLC, Appellant, v. PENNSYLVANIA DEPARTMENT OF HEALTH, OFFICE OF MEDICAL MARIJUANA, Appellee.	: : : : : : : : : : :	No. MM 17-095 D No. MM 17-096 D

PROPOSED ORDER

AND NOW, this _____ day of _____, 2018, upon consideration of the Exceptions filed by Appellant and any response thereto, and upon review of the transcript of testimony and evidence of record in this administrative appeal, the Hearing Examiner's Proposed Report is not adopted.

The proposed Findings of Fact and Conclusions of Law issued by the Hearing Examiner are not supported by competent testimony or evidence. Appellant failed to sustain its burden of proof on appeal and has failed to prove any error in the scoring of its Dispensary Permit Applications warranting reversal of the Office of Medical Marijuana's determination that an award of a dispensary permit application to Keystone ReLeaf, LLC was not in the best interests of the Commonwealth.

Accordingly, the administrative appeal is dismissed and the scoring and permitting decisions of the OMM as to the Dispensary Permit Applications of Keystone ReLeaf, LLC are affirmed.

_____

Raphael M. Barishansky
Deputy Secretary of the Department of Health

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OFFICE OF MEDICAL MARIJUANA'S BRIEF ON EXCEPTIONS

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INTRODUCTION

The Commonwealth of Pennsylvania's statutorily mandated Medical Marijuana Program (the "Program") has provided much-needed medical treatment for Pennsylvanians desperate to find relief from a myriad of serious health conditions. Given the limited number of permits available to dispense and/or grow/process medical marijuana, however, the vast majority of permit applicants failed to obtain a permit, resulting in predictable challenges to the Commonwealth's implementation of the Program. While the circumstances varied, the challenges shared a common theme: "if we did not receive a permit, the process for evaluating applications must have been flawed."

Keystone Releaf, LLC ("Keystone") joined the challenge fray, making repeated allegations of "unconstitutionality" and "arbitrariness," and seeking to upend the entire program. In support of its many challenges, Keystone effectively contended that it can second-guess every discretionary act of the Department of Health, Office of Medical Marijuana ("OMM"), the agency charged by the General Assembly to effectuate the new medical marijuana program. But more than just being antithetical to the law and regulations governing the program, Keystone's arguments callously threatened the dire need to provide medical treatment to thousands of ailing Pennsylvanians. Seemingly indifferent to that urgency, Keystone challenged the Department's discretionary decisions, including the manner and extent of employee training, the time for reviewing permit applications, and the weight given to the various sections of the application by OMM.

Following hearings, and ignoring the record testimony and the legal parameters of the delegation of administrative authority, the Hearing Examiner assigned to this case issued a strikingly legally deficient and factually unsupported opinion, accepting Keystone's hollow

arguments, and in so doing, obfuscating the legal framework governing permit appeals. The Hearing Examiner authored a Proposed Report, recommending relief that singularly relies upon the incorrect assertions of the law and unsupported conclusory averments brazenly put forth by Keystone, and improperly shifts the burden of proof in the administrative appeal entirely to OMM, a patent error of law that alone requires reversal. In addition, the proposed findings of fact contradict the discussion portion of the Proposed Report, and the recommended relief plainly exceeds the authority delegated to the Hearing Examiner by the Deputy Secretary's Delegation Order.

Thus, the Proposed Report is fatally flawed, compelling the filing of the within Exceptions, and amendment and correction of the Hearing Examiner's legally deficient and factually unsupported decision.

STATEMENT OF THE CASE

A. Pennsylvania's Medical Marijuana Program

On April 17, 2016, Governor Wolf signed into law the Medical Marijuana Act (Act), 35 P.S. § 10231.101-.2110, legalizing medical marijuana in the Commonwealth. Seeking to provide relief to citizens suffering from "serious medical conditions,"[1] the General Assembly recognized that "[s]cientific evidence suggests that medical marijuana is one potential therapy that may

[1] Pursuant to Section 103 of the Act, a "Serious medical condition" includes: (1) Cancer; (2) Positive status for human immunodeficiency virus or acquired immune deficiency syndrome; (3) Amyotrophic lateral sclerosis; (4) Parkinson's disease; (5) Multiple sclerosis; (6) Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity; (7) Epilepsy; (8) Inflammatory bowel disease; (9) Neuropathies; (10) Huntington's disease; (11) Crohn's disease; (12) Post-traumatic stress disorder; (13) Intractable seizures; (14) Glaucoma; (15) Sickle cell anemia; (16) Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective; and (17) Autism. 35 P.S. § 10231.103. Additional conditions were added in accordance with Section 10231.1202 of the Act, upon the recommendation of the Medical Marijuana Advisory Board, and the promulgation of Temporary Regulations by the Department. See 28 Pa. Code § 1141.21.

mitigate suffering in some patients and also enhance the quality of life." 35 P.S. § 10231.102(1). As such, the Act directed the Department of Health ("Department") to administer this new program. 35 P.S. § 10231.301(a).

Tasked with overseeing the robust program and implementing of the Act, the Department established OMM. The delegated responsibilities of the Department/OMM includes issuing "permits to medical marijuana organizations to authorize them to grow, process or dispense medical marijuana and ensure their compliance with [the] Act." 35 P.S. § 10231.301(a)(1). The Act sets forth the general criteria that the Department and OMM must consider before granting a permit to a medical marijuana organization. *See* 35 P.S. §§ 10231.602-10231.603. "In order to facilitate ***prompt implementation***" of the medical marijuana program, the Act also authorizes the Department to promulgate Temporary Regulations. 35 P.S. § 10231.1107.

To initiate the first phase of the program, known as Phase I, the Department promulgated Temporary Regulations setting forth the general provisions for operating the medical marijuana program, including, but not limited to, the process to apply for a medical marijuana organization permit. 28 Pa. Code §§ 1141.21-1141.50. The Department's Temporary Regulations established additional criteria an applicant must meet before it may be awarded a grower/processor or dispensary permit. 28 Pa. Code §§ 1141.27-1141.34. Additionally, the Department's Temporary Regulations established six medical marijuana regions. 28 Pa. Code § 1141.24.

The Department published a Notice in the *Pennsylvania Bulletin* notifying interested parties that the Department would make available, on its website on January 17, 2017, the medical marijuana grower/processor and dispensary permit applications, inclusive of Application Instructions and attachments. The Notice also indicated the Department's plan to issue up to 27 dispensary permits and up to 12 grower/processor permits during Phase I permitting. OMM

received approximately 457 applications from prospective dispensary and grower/processor permit applicants during Phase I. Approximately 280 of the 457 applications that the Department received during Phase I were dispensary applications. As expressed in the Notice, OMM awarded 27 dispensary permits following the Phase I application submissions; the remaining applicants were unsuccessful.

Keystone was one of the unsuccessful applicants in Phase I. Keystone submitted two dispensary permit applications for Region 2, one in Lehigh County and one in Northampton County.[2] Keystone's dispensary permit applications scored 20th and 21st out of the 42 scored applications for Region 2. Keystone was 52.4 points behind the top score in Lehigh County and 24.2 points behind the top score in Northampton County. Because Keystone's applications received lower scores than the top dispensary permits scored in Region 2, OMM determined awarding Keystone a dispensary permit was "not in the best interest of the welfare, health, or safety of the patients and citizens of this Commonwealth." (*See* Ex. D-7, at OMM 1258.)

B. Keystone's Administrative Appeal

Keystone appealed the denial of its dispensary permit applications and the Department held administrative appeal hearings on April 10, 2018 and April 17, 2018 through its delegated hearing examiner. Chief Hearing Examiner Jackie Wiest Lutz ("Hearing Examiner") presided over both days of hearings. Prior to hearing testimony of the witnesses, the Hearing Examiner stated that OMM agreed to present its witnesses and evidence first. The Hearing Examiner explained that while Keystone "obviously has the burden of proof," the OMM would present first so that both parties would have the benefit of OMM's exhibits. (N.T., 6:7-12.)

[2] Both of Keystone's applications proposed one primary location and two satellite locations. The application for Lehigh County included satellite locations in Monroe County and Luzerne County. The application for Northampton County included satellite locations in Lehigh County and Monroe County.

OMM presented three witnesses; Keystone presented none.

C. Department/OMM Witnesses

1. Sunny Podolak

First to testify was OMM Assistant Director Sunny Podolak ("Podolak"). (N.T. Podolak, 11:9-10.) Podolak testified that she served in both an administrative capacity as Assistant Director, handling matters such as human resources, budgeting, and IT issues, and as Chair of the Evaluation Committee,[3] the committee responsible for scoring the permit applications. (N.T. Podolak, 12:8-9, 14-19, 13:3-4.)

Permit Application Processing and Administration

Podolak explained OMM's three-step system for processing permit applications. During the "Intake" step, OMM would check each mailing from an applicant to verify that it contained the USB drive with the application and attachments, the checks for the required fees, and the proof of mailing (verifying timely submission). (N.T. Podolak, 22:24-23:14.) Then during the "Assessment" step, OMM would conduct a page-by-page check for completeness. (N.T. Podolak, 24:2-8.) Podolak testified that Assessment differed from intake in that someone actually paged through the application and attachments. (N.T. Podolak, 24:16-20.) The final step was "Evaluation," where the Evaluation Committee scored the applications. (N.T. Podolak, 24:25-25:3.)

Podolak testified that as Chair of the Evaluation Committee, she oversaw the Evaluation process, including training of the Evaluation Committee, but she did not score the applications herself. (N.T. Podolak, 25:17-25.) Podolak testified that the Evaluation Committee members

[3] Podolak testified that "Evaluation Committee" was used interchangeably with "Scoring Committee." (N.T. Podolak, 25:7-12.) Both names are used throughout the hearing testimony.

came from various specialized agencies, including the Department of Community and Economic Development (DCED) and the Department of General Services (DGS). (N.T. Podolak, 26:1-6.)

Podolak testified that OMM trained the Evaluation Committee over a two-day period. (N.T. Podolak, 27:5-8.) The first day, Committee members received general training that included a PowerPoint presentation. (N.T. Podolak, 27:21-24.) That presentation entailed an overview of the Medical Marijuana Program, the Act and the Temporary Regulations, the expectations of the Committee, how to score an application without comparing one application to others, and the schedule for scoring all of the applications. (N.T. Podolak, 29:7-20, 30:11-21.) The Committee members were able to ask questions and receive answers. (N.T. Podolak, 36:20-37:3.) Podolak testified that the Committee members were instructed not to consider outside resources, namely because she "did not want them to do any additional research on the applicant." (N.T. Podolak, 35:19-22.)

Then, on the second day, the Committee received training from the individual members of the Committee on their specific area of expertise. (N.T. Podolak, 36:9-19.) Like the first day of training, the second day was "interactive" in that the Committee members asked questions, received answers, and discussed the topic of the presentation. (N.T. Podolak, 37:4-6.) Following the individual presentations, the Committee members looked through a completed application as a preview of the scoring process. (N.T. Podolak, 36:15-19.) OMM provided the Evaluation Committee members with materials to take with them: the PowerPoint from the first day of the training, a blank application, the instructions for the application and attachments, the Act and Temporary Regulations, and the General Rules of Administrative Practices and Procedure. (N.T. Podolak, 37:10-16.)

Scoring of Applications

Podolak testified that there were essentially three groups within the Evaluation Committee. (N.T. Podolak, 44:1-12, 45:1-7.) First, only the representative from DGS, DeShawn Lewis (whose testimony is summarized below), scored Diversity. (N.T. Podolak, 44:1-5.) Second, there were several Committee members from DCED on the Committee. (N.T. Podolak, 45:1-12.) They scored the whole application except for the portion that pertained to Diversity. (*Id.*) Those Evaluation Committee members from DCED were the only Committee members that scored Community Impact. (*Id.*) Then, the remaining Committee members, of varying specialties, scored the application minus Diversity and minus Community Impact.

Podolak testified that in addition to the training materials Committee members took with them, she also provided them with a "Scoring Worksheet." (N.T. Podolak, 40:14-18.) The specific categories and point allocation in the Scoring Worksheet track the categories and point allocation on the "Scoring Rubric" portion of the application instructions (which, of course, mirrors the application itself). (N.T. Podolak, 42:24-43:7.) So for each section of the application, Parts A through F, the Scoring Worksheet provides a column for the Committee member's initial score and a column for notes on that part of the application. (*Id.*; see also Ex. D-4a.)

To provide consistency in scoring, the Scoring Worksheet provided the following "Point Allocation Guide":

If the total number of points = Then scores are as follows	25	50	75	100
Exceeds Expectations	21-25	41-50	66-75	81-100
Better Than Average	16-20	31-40	46-65	61-80
Meets Expectations	11-15	21-30	31-45	41-60
Below Expectations	6-10	11-20	16-30	21-40
Not Acceptable	0-5	0-10	0-15	0-20

(Ex. D-4a, OMM 0063.) The purpose of the Point Allocation Guide was to prevent wide ranges of scores in the individual sections. (N.T. Podolak, 31:1-33:11.) Podolak testified, as an example, that where two individual scorers believed an application "Exceeds Expectations" in a section with 25 maximum points, the Point Allocation Guide directed the scorer to assign a score between 21 and 25. (N.T. Podolak, 31:3-11, 32:19-24.) That way, however Committee members viewed the applications differently, they were confined in score they could give based on that determination of the application's quality. (*Id.*)

Podolak testified that the Evaluation Committee would receive between 20 and 25 applications a week to score. (N.T. Podolak, 38:11-17.) The Committee would meet twice a week, and score about half of that week's applications on one day, and the other half on the other meeting day. (N.T. Podolak, 38:8-23.) The Committee members brought the Scoring Worksheet to the meetings with their initial scores and notes, and discussed the strengths and weaknesses of the applications. (N.T. Podolak, 49:6-15.) The Committee members discussed the different sections of the application, but they never discussed the actual numerical score they assigned to each section. (N.T. Podolak, 49:16-50:7.) She testified that the Committee members received an "Evaluation Score Sheet" at the meetings to capture their final score in case they made any modifications after the group discussion. (N.T. Podolak, 45:22-46:6.) They submitted the Evaluation Score Sheet at the end of Committee meetings, which OMM would average to arrive at an applicant's final score. (N.T. Podolak, 50:19-25.)

Podolak testified that the Evaluation Committee Members were always prepared, and the meetings appeared to be productive. (N.T. Podolak, 48:21-49:5.) She testified that the Committee members gave her no reason to believe they did not review the full applications

before the meetings. (N.T. Podolak, 114:12-15.) No Committee member expressed to Podolak that they did not have enough time to review and score the applications. (*Id.*)

Keystone's Cross-Examination

On cross-examination, Podolak answered a lot of questions about time. She testified that 20 to 25 applications was a "manageable workload" for the Evaluation Committee. (N.T. Podolak, 86:11-15.) Podolak acknowledged that some of the applications were voluminous, consisting of thousands of pages, while the smaller applications had hundreds of pages. (N.T. Podolak, 87:17-88:2.) She could not provide an average page number for the applications, however, because she did not score the applications. (N.T. Podolak, 101:18-24.) Podolak agreed that both of Keystone's dispensary permit applications were over 1,100 pages. (N.T. Podolak, 113:11-13.) Podolak repeated her contention that she never received requests for more time and though she did not review all of the Scoring Worksheets, she did observe them filled out at the meetings. (N.T. Podolak, 93:8-11, 102:14-19, 103:11-17.)

Podolak also answered questions on cross-examination regarding the training and scoring categories. She testified that she provided training regarding the five scoring categories in the Scoring Worksheet, but she did not define those categories to the Committee members. (N.T. Podolak, 70:17-71:9, 105:8-24, 106:3-7.) So she did not train the Committee members on what, for example, "average" meant vis-à-vis "Better Than Average." (N.T. Podolak, 106:3-7, 108:18-109:2.) She testified that she also did not train the Committee members on how to score portions such as providing dates in the Operational Time Table section or providing identification for the Proof of Identification section. (N.T. Podolak, 79:6-17, 11:1-22.) Instead, the Committee members were given discretion to score based on their experience and training. (N.T. Podolak, 76:14-20, 77:23-78:3.)

2. Arthur McNulty

Arthur McNulty (McNulty) testified second. McNulty was a local government policy specialist with DCED. (N.T. McNulty, 138:1-3.) He testified that he works with Act 47[4] and Early Intervention Programs designed to aid financially distressed municipalities. (N.T. McNulty, 138:4-8.)

Training and Scoring

McNulty testified that he received the 2-day training as explained by Podolak. (N.T. McNulty, 139:19-22.) He testified that during training, he was given the opportunity to ask questions and receive answers and he relied on the training in his scoring of applications. (N.T. McNulty, 140:9-14, 24-24.) He testified that OMM instructed him and the other Committee members not to compare applications to one another, and that he never heard other members comparing applications. (N.T. McNulty, 141:23-24, 142:23-143:2.) McNulty testified that while there were sections on the application that did not relate to his particular expertise, he was still able to grade those sections given the training from OMM and expertise from other Committee members. (N.T. McNulty, 150:23-151:10.)

He also testified that he did not believe the Point Allocation Guide required training to use. (N.T. McNulty, 149:6-150:2.) He viewed it as an intuitive grading scale such as the A, B, C, D, F grading scale used in elementary school. (N.T. McNulty, 149:14-24.)

McNulty testified that he began scoring applications the week following training. (N.T. McNulty, 144:9-12.) He testified that he would new receive applications on USB drives every week. (N.T. McNulty, 145:8-10.) He described that he first read through the application in full and then went back and scored each section using the Scoring Worksheet. (N.T. McNulty,

[4] Act of July 10, 1987, P.L. 246, *as amended*, 53 P.S. §§ 11701.101-.712.

147:20-25, 148:15-21, 150:3-9.) McNulty testified that he read the entire application first because some information applied to multiple sections. (N.T. McNulty, 150:10-12.) He continued, "the transportation section" for example, "could also affect the security or the diversion prevention or the storage sections." (N.T. McNulty, 150:15-17.) Thus, it was important to review all of the information before scoring individual sections. (*Id.*)

McNulty explained that only the Evaluation Committee members from DCED, himself included, scored the Community Impact portion of the applications. (N.T. McNulty, 156:23-157:3.) He testified that the DCED Committee members developed a scoring rubric to score Community Impact, listing 4 factors to consider: "Job Creation," "Site Selection," "Need for Economic Development," and "Priority Points."[5] (N.T. McNulty, 157:8-16; *see also* Ex. D-4c.) He testified that Job Creation considered whether the entity would create new employment opportunities. (N.T. McNulty, 160:20-24.) The next category, Site Selection, considered whether the site of the dispensary was in a distressed municipality. (N.T. McNulty, 161:17-24.) Need for Economic Development considered the unemployment rate of the county/municipality of the proposed dispensary location. (N.T. McNulty, 162:21-23.) Finally, Priority Points consider other factors like initiatives to partner with local senior centers, universities, or local law enforcement. (N.T. McNulty, 163:1-6.) McNulty testified that in creating the Community Impact rubric he considered the Act and the Temporary Regulations and the goal that the business would have a positive impact on that municipality and its citizens. (N.T. McNulty, 160:11-15.)

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[5] While the Community Impact scoring rubric, Exhibit D-4c, page OMM 0070, is titled "Community Impact Scoring for Growers/Processors," Podolak testified that the DCED Committee members used that rubric for both dispensary applications and grower/processor applications. (N.T. Podolak, 44:13-25.)

He testified that the initial scores he assigned while scoring, however, were subject to change based on the discussions at the Evaluation Committee meetings. (N.T. McNulty, 151:16-22.) McNulty testified that those discussions were "extremely helpful." (N.T. McNulty, 156:4-6.) He reaffirmed Podolak's testimony that the Committee members never discussed the actual numerical scores that they had given or would give to applications. (N.T. McNulty, 153:16-24.) Instead, they discussed the strengths and weaknesses of each application. (N.T. McNulty, 154:2-3.)

McNulty testified regarding some of the applications sections other than Community Impact. He testified that for the Personal Identification section, the factors he considered were whether the applicant provided the required identification and resume for its employees, as required by the Application Instructions. (N.T. McNulty, 169:24-170:14.) He testified that he considered whether the applicant had both a resume and an identification for each person, whether the identifications matched the resume, whether the identification was current and legible. (*Id.*) He stressed that everyone identified in the application needed to be accounted for in the identification section. (N.T. McNulty,170:20-23.)

McNulty also explained that in evaluating the Security and Surveillance, and Transportation, the Evaluation Committee viewed use of a third party as a negative. (N.T. McNulty, 187:16-25.) The rationale, McNulty explained, was the potential that hiring third parties for those tasks could serve as a way for the applicant to avoid responsibility. (N.T. McNulty, 180:6-10.) That is, the Committee members looked favorably at applicants that kept those tasks in-house, so that the applicant would not be able to use the third party as a scape goat if something went wrong. (N.T. McNulty, 187:16-25.)

Regarding time, McNulty testified that he had enough time to read each application in full and provide a score for each section. (N.T. McNulty, 146:15-16.) He testified that his ordinary duties at DCED were drastically reduced, enabling him to focus his time and energy on scoring applications. (N.T. McNulty, 147:2-6.) He testified that he worked 7 days a week to during the scoring process. (N.T. McNulty, 146:20-22.) McNulty emphasized that there was never a time when he was not able to review all of the assigned applications, and that he never heard anyone else intimate that they could not review all of the applications. (N.T. McNulty, 147:11-17.)

Keystone's Application

McNulty testified that he did not remember the score that he assigned for Keystone's dispensary permit applications. (N.T. McNulty, 178:23-179:1.) He also did not recall the score he assigned for individual sections of the applications. (*Id.*) But in reviewing those applications for the administrative hearings, he noticed deficiencies that would have likely impacted their score. (N.T. McNulty, 179:7-9.)

First, Keystone had several deficiencies with the Personal Identification section of the applications. (N.T. McNulty, 173:15-17, 174:11-18.) Keystone failed to provide personal identifications and resumes for everyone referenced in its application. (N.T. McNulty, 174:11-18.) For example, Keystone listed Nicholas Chaffier as the Director of Retail operations, but failed to provide his identification or resume. (N.T. McNulty, 175:3-11.) Keystone provided a list of its Scientific Advisory Board members, but failed to include identifications or resumes for any of them. (N.T. McNulty, 175:15-176:5.) Likewise, Keystone failed to include identifications or resumes for anyone from Sollott Investments, one of its financial backers. (N.T. McNulty, 176:11-24.) Moreover, of the identifications that Keystone did include, some

were expired, and some were unreadable. (N.T. McNulty, 177:10-178:22.) McNulty testified that he took those issues into account in assigning Keystone less than the maximum points. (N.T. McNulty, 178:18-22.)

Second, Keystone's applications lost points on the Capital Requirement section because the funds were subject to an escrow agreement between Keystone's investors and a bank. (N.T. McNulty, 184:23-185:8.) The application required "at least $150,000" and Keystone had nearly 7 million dollars listed, though subject to that agreement. (*Id.*) McNulty explained that the escrow agreement meant that Keystone's capital was "not as liquid so-to-speak as we would like to see." (N.T. McNulty, 185:3.) McNulty testified that the escrow agreement was not as immediately available as the Committee would want for the applicant to put toward the business. (N.T. McNulty, 185:11-18, 21-23.) He explained that Keystone likely lost points because it would first have to enforce the agreement between the investors and the bank. (*Id.*)

Third, Keystone contracted out the Security and Surveillance and Transportation sections of its application to third parties. (N.T. McNulty, 188:22-189:1.) McNulty testified that the Evaluation Committee looked for applicants to take responsibility of security and transportation operations. (N.T. McNulty, 189:6-9.) It was seen as a "major minus" that Keystone intended to use third party contractors for security and transportation because Keystone could then blame the third party in the event that something went wrong. (N.T. McNulty, 187:16-20.)

Keystone's Cross-Examination

On cross-examination, McNulty repeated his testimony that he had sufficient time to review the applications in full. (N.T. McNulty, 200:17-201:10.) He testified that he spent between an hour and an hour and a half to review each application. (*Id.*) He testified that the

shortest application was about 100 pages, and the average was between 200 and 300 pages. (N.T. McNulty, 200:10-14.)

Facing questions about the Scoring Worksheet, McNulty testified that he discarded the various copies that he filled out during the scoring, though not at the direction of OMM. (N.T. McNulty, 196:23-197:2.) On the subject of the Point Allocation Guide on each page of the Scoring Worksheet, he testified that, to him, "average" meant a "C" level grade, based on what he expected to see after the training he received. (N.T. McNulty, 198:10-11, 16-18.)

McNulty also testified regarding the Community Impact rubric that he and the other DCED Committee members created. He testified that applicants that proposed a location in an Act 47 municipality would receive all possible points for Site Selection, unless that municipality was in the process of leaving Act 47 "distressed municipality" status, in which case it would receive less. (N.T. McNulty, 222:15-223:1) He acknowledged that Act 47 was not referenced in the application, Application Instructions, or the Medical Marijuana Act or Temporary Regulations. (N.T. McNulty, 217:6-218:20.)

McNulty testified that he did not know for sure that he deducted points for Keystone's failure to provide identification and a resume for Nicholas Chaffier. (N.T. McNulty, 203:10-19.) He testified that over six months had passed between his scoring of the application and the hearing. (*Id.*) Thus, he did not recall what specific deficiencies in Keystone's applications caused him to deduct points, only that they were generally the types of deficiencies for which he typically deducted points. (N.T. McNulty, 205:12-18.)

Regarding Keystone's Capital Requirement, McNulty testified that he considered $150,000 in capital "not acceptable" because it was the bare minimum. (N.T. McNulty, 225:8-24, 231:18-19.) He testified that he did not recall the score he gave Keystone in that

section, but that no one received a perfect score. (N.T. McNulty, 230:16-19.) He testified that "any impediment to the cash being accessed immediately," such as Keystone's escrow agreement, was seen as a negative. (N.T. McNulty, 212:16-18.) McNulty testified that there was nothing in the application or in the Act that indicated an amount of capital sufficient to receive a perfect score. (N.T. McNulty, 231:24-232:10.)

Finally, on cross-examination, McNulty answered questions regarding Keystone's use of a third party for Security and Surveillance and Transportation. He testified that he could not remember the exact deficiencies with Keystone's applications that resulted in lower scores. (N.T. McNulty, 208:5-10.) Keystone's counsel had McNulty read from the Security and Surveillance portion of Keystone's application which stated, "Security Officers serving as contractual employees of KSR [(Keystone)]." (N.T. McNulty, 209:23-210:4.) Keystone's counsel additionally drew McNulty's attention to a portion of Keystone's application that reflected a security overlay and McNulty acknowledged that his earlier testimony, that Keystone failed to include a security overlay, was incorrect. (N.T. McNulty, 208:1-6.)

Department/OMM Redirect

On redirect, McNulty testified that because the Capital Requirement required "at least $150,000," that he viewed that amount as the floor, rather than the ceiling. (N.T. McNulty, 234:15-20.) He further explained that he viewed the requirement in relation to the urgency to provide treatment, and thus, did not view $150,000 as sufficient for an applicant to be operational within 6 months. (N.T. McNulty, 235:16-22.)

Regarding Security and Surveillance, he testified that the portion of the application that Keystone's counsel had him read—"Security Officers serving as employees of [Keystone]"—

was under the heading "Retention of Outside Vendor." (N.T. McNulty, 239:14-24.) He interpreted that to mean that they had hired a third party for Security. (*Id.*)

Last on redirect, McNulty testified regarding the absence of specific references to Act 47 in the application, Application Instructions, the Act, and the Temporary Regulations. McNulty testified that the Community Impact section of the application itself provided that OMM will consider the "positive impact on the community." (N.T. McNulty, 244:22-25.) The Scoring Methodology portion of the Application Instructions also provided that OMM would consider "Areas of recognized need for economic development." (N.T. McNulty, 245:19-24.) And finally, Section 1141.24 of the Temporary Regulations provided: "The Department will consider . . . areas with recognized need for economic development." (N.T. McNulty, 246:14-247:4.) McNulty testified that all of those were available to the applicant before the application submission deadline. (N.T. McNulty, 247:16-19.)

3. DeShawn Lewis

Finally, DeShawn Lewis (Lewis) testified for OMM. Lewis was the Director of the Bureau of Diversity, Inclusion, and Small Business Opportunities for DGS. (N.T. Lewis, 259:21-23, 260:12-13.) In that role, Lewis oversaw efforts by the Commonwealth in fostering diversity and inclusion with government contracts. (N.T. Lewis, 260:18-24.)

Training and Scoring

Lewis testified that she received training by OMM for scoring medical marijuana permit applicants. (N.T. Lewis, 263:4-6, 264:5-24.) The training provided information regarding the Commonwealth's Medical Marijuana Act and included the PowerPoint presentation discussed by Podolak and McNulty. (N.T. Lewis, 264:3-18.) OMM provided her with the materials after the two days of training. (N.T. Lewis, 266:14-25.) She was given the opportunity to ask questions

and receive answers. (N.T. Lewis, 264:16-18.) Lewis testified that she was instructed not to consider outside resources and not to compare applications to one another. (N.T. Lewis, 266:6-8.)

Lewis testified that only she scored the Diversity section of the applications and that Diversity was the only section that she scored. (N.T. Lewis, 278:6-11.) She testified that, with the help of her Bureau, she developed a scoring rubric for Diversity. (N.T. Lewis, 267:17-19.) She testified that the permit application required applicants to submit a Diversity Plan. (N.T. Lewis, 267:23-268:4.) The application listed diverse groups to discuss and provided 9 factors that the applicant should discuss in its Diversity Plan. (*Id.*) Specifically, Lewis's testimony referenced this part of the application:

DIVERSITY PLAN

IN NARRATIVE FORM BELOW, DESCRIBE A PLAN THAT ESTABLISHES A GOAL OF DIVERSITY IN OWNERSHIP, MANAGEMENT, EMPLOYMENT, AND CONTRACTING TO ENSURE THAT DIVERSE PARTICIPANTS AND DIVERSE GROUPS ARE ACCORDED EQUALITY OF OPPORTUNITY. TO THE EXTENT AVAILABLE, INCLUDE THE FOLLOWING:

1. The diversity status of the Principals, Operators, Financial Backers, and Employees of the Medical Marijuana Organization.
2. An official affirmative action plan for the Medical Marijuana Organization.
3. Internal diversity goals adopted by the Medical Marijuana Organization.
4. A plan for diversity-oriented outreach or events the Medical Marijuana Organization will conduct to support its diversity goals in ownership, management, and employment.
5. Contracts with diverse groups and the expected percentage and dollar amount of revenues that will be paid to the diverse groups.
6. Any materials from the Medical Marijuana Organization's mentoring, training, or professional development programs for diverse groups.
7. Any other information that demonstrates the Medical Marijuana Organization's commitment to workforce and employment diversity practices.
8. A workforce utilization report including the following information for each job category within the Medical Marijuana Organization:
    a. The total number of persons employed in each job category,
    b. The total number of men employed in each job category,
    c. The total number of women employed in each job category,
    d. The total number of veterans employed in each job category,
    e. The total number of service-disabled veterans employed in each job category, and
    f. The total number of members of each racial minority employed in each job category.

9.	A narrative description of your ability to record and report on the components of the diversity plan.

(*See* Ex. D-2, OMM 0014-0015.)

Lewis testified that she and the Bureau based the Diversity scoring rubric, titled "Diversity Plan Evaluation Matrix," on those 9 factors. (N.T. Lewis, 267:20-268:4.) Lewis explained that the total score for Diversity was divided into two parts: Diversity Practices and Subcontracting with Diverse Groups. (N.T. Lewis, 270:3-7, 15-21.) Diversity Practices, worth 75 of the 100 points, examined the internal demographics of the applicant, including ownership, management, and employment. (N.T. Lewis, 270:3-14.) Subcontracting with Diverse Groups was worth the remaining 25 points. (N.T. Lewis, 270:15-271:18.)

Lewis testified that she used staff within her Bureau to assist her with the scoring. (N.T. Lewis, 276:4-13.) While only she would provide a final score, members of her staff also reviewed the applicant's Diversity Plan. (N.T. Lewis, 276:14-17.) The staff members would point out strengths and weaknesses of each Diversity Plan, and sometimes suggest a score for that applicant. (N.T. Lewis, 277:9-15.) Lewis emphasized that she had the final say and that only she gave the final score; she did not simply average suggested scores by her staff. (N.T. Lewis, 277:4-23.) She testified that rather than use the Scoring Worksheet, she provided OMM with a memorandum that reflected the application number and her Diversity score for that application. (N.T. Lewis, 275:21-25.)

Keystone's Application

Lewis testified that she gave Keystone a 32 out of 100 total points for Diversity. (N.T. Lewis, 284:23-24.) She testified that "there were some concerns" verifying Keystone's promises of diversity efforts. (N.T. Lewis, 282:16.) Lewis testified that there was nothing she could see in the application to support Keystone's claim that it would use 33% of all "contract spend" on

diverse suppliers, a projected $666,000 of $2,000,000. (N.T. Lewis, 283:12-25.) There were no references to contracts or letters of intent to substantiate those amounts. (*Id.*) No supposedly diverse vendors were identified. (N.T. Lewis, 284:1-7.) The applications purported to commit $100,000 to the Hispanic Center of the Lehigh Valley, but failed to say what that money was for or if it formed part of the $666,000 referenced earlier. (N.T. Lewis, 287:7-288:15.) The application did not provide a demographic breakdown of hiring plans. (N.T. Lewis, 289:9-13.) The breakdown of the current employees was either inconsistent or otherwise unverifiable based on the application. (N.T. Lewis, 289:24-292:6.) Finally, Keystone made general statements of prior "successes" pertaining to diversity, without any specificity as to what those successes were. (N.T. Lewis, 293:24-294:13.)

Despite its failings, Lewis assigned Keystone a score reflecting a "Moderate commitment to diversity." (N.T. Lewis, 303:16-304:24.) She testified that she awarded points to Keystone for stating its goals to hire diverse employees and use diverse subcontracting even though there was no supporting information. (N.T. Lewis, 304:7-24.) She also awarded points for stating that it would have a diversity manager. (N.T. Lewis, 305:8-16.)

Cross-Examination

On cross-examination, Lewis primarily answered questions about her use of a scoring rubric that was not the Scoring Worksheet from OMM and her use of her staff from the Bureau of Diversity, Inclusion, and Small Business Opportunities to assist her.

Regarding the rubric she developed with her Bureau, she testified that she brought that rubric to the second day of training and received verbal approval from OMM to use that rubric in place of the Scoring Worksheet. (N.T. Lewis, 352:11-353:12.) She testified that the Diversity rubric was not available to applicants before they submitted applications. (N.T. Lewis,

356:19-22.) She testified that to receive points in the second portion of her rubric, pertaining to Subcontracting with Diverse Groups, she expected to see some breakdown of the purportedly diverse subcontracting. (N.T. Lewis, 367:5-25.) Keystone lost points because its applications had no information to substantiate the proposed 33% of diverse contracting. (N.T. Lewis, 367:9-13.) She testified that Keystone did mention some diverse groups by name, but Keystone also made unspecified statements of entities that Keystone identified as potential partners. (N.T. Lewis, 373:14-374:2, 379:18-25.)

Lewis testified that she used about 5 people from her Bureau to help her score the applications. (N.T. Lewis, 312:1-4.) She testified that she approached the Diversity scoring for the Medical Marijuana permitting the same way she would in her normal capacity with DGS, scoring government contracts. (N.T. Lewis, 315:17-316:23.)

SUMMARY OF POSITION

The Proposed Report fails to account for the fact that the General Assembly granted the Department and OMM the necessary discretion to undertake this herculean task. Regrettably, the Hearing Examiner to joined Keystone in hypothesizing all of the different ways OMM could have awarded Keystone a permit had it made different discretionary decisions along the way. The Hearing Examiner not only determined that Keystone was entitled to a rescore without it having presented even a shred of evidence; she actually cited the lack of evidence as a reason to hold against OMM. In so doing, the Hearing Examiner appears to have reversed the burden, putting the onus on OMM to defend the lawfulness of its novel program.

Keystone cannot point to a single instance where OMM's permitting scheme contravened the Medical Marijuana Act. OMM developed an in-depth system of scoring permit applications to ensure consistency and uniformity. The Proposed Report even noted as much, noting that

despite grading Keystone's identical applications at different times and without comparing them to one another, there was only a .06 difference between those scores. Somehow, the Hearing Examiner still determined that there were missteps that warranted a rescore. The Findings of Fact have no support in the record, the legal analysis is flawed and internally inconsistent, and the Report does not identify a single instance where OMM acted inconsistently with the Act. The Proposed Report has left much for this Tribunal to correct.

EXCEPTIONS

The Proposed Report finds no support in fact or in law, thereby necessitating the following corrections. As such, OMM requests this Honorable Tribunal to amend and correct the decision of the Hearing Examiner to mitigate its fundamental failings. Specifically, OMM takes exception to the Proposed Report on the following grounds:

1.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Report's Findings of Fact. The Findings of Fact lack record support and thus provide no basis for the Proposed Report's Conclusions of Law and analysis. Specifically, OMM takes exception to Finding of Fact 43, Finding of Fact 50, Finding of Fact 52, Finding of Fact 54, Finding of Fact 55, Finding of Fact 69, Finding of Fact 70, Finding of Fact 74, Finding of Fact 75, Finding of Fact 83, Finding of Fact 85, Finding of Fact 89, and Finding of Fact 91.

2.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Report's impermissible burden shift to OMM. Keystone had, and continues to have, the burden of proof.

3.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Report's standard of proof.

4.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Report's conclusions regarding the time for Evaluation Committee members to score applications.

5.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Report's conflicting determinations regarding the training of the Evaluation Committee.

6.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Report's conflicting determinations regarding the absence of scoring errors.

7.

OMM takes exception to, and this Tribunal should decline to adopt, the legal significance assigned to OMM's process for scoring Diversity.

8.

OMM takes exception to, and this Tribunal should decline to adopt, the determination that OMM considered criteria that were in addition to or contrary to the Medical Marijuana Act and the Department's Temporary Regulations for the Medical Marijuana program.

9.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Report's Conclusions of Law 5 and 6.

10.

OMM takes exception to, and this Tribunal should decline to adopt, the Proposed Order. The Hearing Examiner's Office exceeded its delegated authority.

ARGUMENT

I. *EXCEPTION 1*: The Findings of Fact in the Proposed Report lack evidentiary support and should be amended.

The Hearing Examiner's Findings of Fact require amendment because they are inaccurate, incomplete, or, in some cases, express acknowledgements about the lack of evidentiary support. This Tribunal should reject the findings of the fact in the Proposed Report and issue new findings that accurately reflect the record. *Dowler v. Public School Employees' Retirement Bd.*, 620 A.2d 639, 641 (Pa. Cmwlth. 1993) (holding the agency head is the ultimate fact finder, not the hearing examiner).

Finding of Fact 43 is misleading and incomplete. By making a finding that the Evaluation Committee members were not required to certify that they read applications in full, the Proposed Report implies that they did not do so. There is not even a scintilla of evidence to suggest that. Every witness that testified at the hearings stated that the Committee members read the applications in full and that there was no indication that they ever went to the meetings unprepared. Finding of Fact 43 should be removed or amended to make clear that the evidence instead supports the conclusion that Committee members did review the entirety of each application.

Finding of Fact 50 ignores the application itself. It suggests that applicants would have been surprised to learn that OMM would score its application based on the various ways that awarding the applicant a permit would promote diversity. But the application itself calls for a Diversity Plan. The application even lists various factors OMM would consider in scoring the

Diversity Plan and Lewis testified that those factors formed the basis of the Diversity rubric. Finding of Fact 50 should be replaced with a finding that acknowledges that the application called for a Diversity Plan and listed multiple components that should be included in that plan. Finding of Fact 50 should also include Lewis's testimony that the Diversity rubric tracks the language reflected on the application.

Finding of Fact 52 is one of many findings that acknowledge the absence of record evidence. OMM was under no obligation to demonstrate that Lewis did distribute the Act and Temporary Regulations to the staff that assisted her. Thus, as discussed below, this finding impermissibly shifts the burden to OMM to present evidence. Finding of Fact 52 also has no bearing on the outcome of the case, as none of Lewis's staff determined the applicant's final Diversity score. As explained below, Lewis's use of her staff to assist in the scoring process provides no support for Keystone's appeal. Finding of Fact 52 is improper and should be discarded.

Similarly, Finding of Fact 54 is immaterial to the outcome of the case. Lewis leaned on her staff to assist her with an onerous project, as is typical in any office, but none of those staff members provided the final score that was at issue. Because she herself was adequately trained and made the final decision regarding scoring, the training of her subordinates is irrelevant. Thus, Finding of Fact 54, while misleading, is inconsequential to this appeal and should be discarded.

Finding of Fact 55 again improperly implies some significance from Lewis's testimony where she stated that she could not remember something. This finding implies that she did *not* have permission to utilize her staff, but that was not her testimony. Her testimony was that she did not recall whether or not she did. That is inconclusive and does not provide support for this

finding. The Hearing Examiner erred by assigning significance to questions that the evidence simply does not answer. As explained below, in effect, the Hearing Examiner shifted the burden to OMM to demonstrate that she *did* have permission from OMM to have her staff assist her. This Finding of Fact is wholly unsupported by the evidence and should be discarded.

Finding of Fact 69 downplays McNulty's testimony regarding the failings in Keystone's applications. Many of the personal identifications in Keystone's applications were blurry, unreadable, expired, or otherwise difficult to read. As Keystone had the burden to demonstrate that it deserved a permit based on its application, Finding of Fact 69 should be amended to include references to the many failings in the identification section of Keystone's application that confirm McNulty's testimony.

Finding of Fact 70, like the many findings that mention the witness's inability to remember, suggests that the absence of information is significant. Noting that the "record is devoid of information" suggests that any evidence from OMM was necessary at all. In fact, OMM had no burden to present such evidence. This absence of evidence, if it has any significance, demonstrates Keystone's failure to meet its burden. The Hearing Examiner reverses the implication of the absence of information to impugn OMM's determinations. Keystone did not present any witnesses, nor did it request the issuance of any subpoena to any member of the scoring committee to compel their testimony. Finding of Fact 70 is improper. It represents the Hearing Examiner's inclination to reverse the burden and should be stricken.

Finding of Fact 74 misrepresents McNulty's testimony regarding the enlistment of a third party to handle Security and Transportation. Whether the third parties were employees or wholly independent entities is a legal conclusion, and otherwise of no moment as to scoring. Whether the individual employees were considered employees of the third party, employees of Keystone,

or employees of both, is irrelevant. As McNulty explained, failure to take responsibility of Security and Transportation offered Keystone the chance to avoid blame in the event of a problem. McNulty also testified that the language in Finding of Fact 74 was under the heading "Retention of Outside Vendor." Keystone's self-serving use of the phrase "contractual employee" does nothing to impede its ability to use its third-party contractors to deflect its own responsibility as McNulty cautioned and considered. Finding of Fact 74 should be removed or replaced with a finding that includes McNulty's justification for scoring decisions impacted by an applicant's use of third parties to potentially avoid responsibility.

Finding of Fact 75 is another improper suggestion that the absence of evidence in any way assisted Keystone to meet its burden of proof. It impermissibly shifts the burden to OMM to present evidence regarding what other Evaluation Committee members considered.

Finding of Fact 83 again improperly assigns significance to the absence of information and impermissibly shifts the burden to OMM to demonstrate other factors the Evaluation Committee considered in scoring the Capital Requirement.

Finding of Fact 85 is incomplete. It should be amended to add testimony by Podolak of the reason that she instructed Evaluation Committee members not to consider outside resources—because she did not want the Committee to do additional research *on the applicants*. That prohibition was not intended to preclude the DCED members from considering their subject of expertise, including Act 47 and unemployment statistics.

Finding of Fact 89 should be amended to include the portions of the application, Application Instructions, and Temporary Regulations that address Community Impact. Specifically, it should be amended to include the fact that OMM would consider whether the

permit would have a "positive impact on the community" and that their assessment would include consideration of "areas of recognized need for economic development."

Finally, Finding of Fact 91 is misleading in that it implies that unemployment is in any way an impermissible consideration for OMM to consider. Finding of Fact 91 should be amended to reflect the absence of any indication to applicants that economic impact would not be considered as part of an applicant's Community Impact score.

II. *EXCEPTION 2*: The Proposed Report improperly shifted the burden to OMM to prove the lawfulness of the program.

OMM has been patient and cooperative. OMM agreed to present its evidence and witnesses first. Keystone provided no witnesses and no evidence. Of course, an applicant for a permit, license, or certificate bears the burden of proving that it meets all of the qualifications necessary for obtaining a permit, license, or certificate. *Barran v. State Bd. of Medicine*, 670 A.2d 765, 767 (Pa. Cmwlth.), *appeal denied*, 679 A.2d 230 (Pa. 1996). Yet the clear implication from the Proposed Report was that OMM had to defend its program, proving the absence of arbitrariness and scoring errors.

In Finding of Fact 50, Finding of Fact 55, Finding of Fact 70, Finding of Fact 75, and Finding of Fact 83, the Proposed Report notes the absence of certain information in the record. Rare is the appeal where a tribunal holds *for the appellant* despite constantly noting the total lack of evidence. Despite repeatedly noting the absence of evidence or the inability of witnesses to recall information, the Proposed Report suggests that Keystone satisfied its burden. By that logic, OMM would only succeed where it affirmatively proved there were no deficiencies in its scoring of applications. The burden was not on OMM to do so; Keystone had, and continues to have, the burden of proof in this matter. The Proposed Report improperly reversed the burden of proof and, thus, failed to hold Keystone accountable. Rather than entertain every minute

challenge to OMM's discretionary acts, this Tribunal should require Keystone to point to any evidence that it is entitled to a rescore.

III. *EXCEPTION 3*: The Proposed Report conflates multiple standards of proof, applies an incorrect standard of proof, and obfuscates the legal framework for these administrative appeals.

Both parties agreed on the standard of proof in this matter. Citing *Belin v. Department of Environmental Resources*, 291 A.2d 553 (Pa. Cmwlth. 1972) and *Keystone Redevelopment Partners v. Gaming Control Board*, 5 A.3d 448 (Pa. Cmwlth. 2010), Keystone acknowledged its burden to prove that OMM's action constituted an abuse of discretion, *i.e.*, clearly unreasonably judgment, or an error of law. (*See* Keystone Br. in Support of Admin. Appeal at 18-19.) Keystone also proceeded at the hearings by forecasting its intent to prove OMM's scoring of applications was "arbitrarily and capricious and unreasonable" and, thus, the Department "abused its discretion." (N.T., 9:8-20.) Setting out to prove the opposite was true, OMM proposed the same standard. (OMM Prop. Findings of Fact and Concl. of Law at 30-31.) Yet despite all of the parties operating under the same framework, the Hearing Examiner chose a different route.

By concluding that Keystone merely had to show "errors" or "irregularities" by a preponderance of the evidence, which she failed to articulate even if that was the standard, the Hearing Examiner conflated multiple standards of proof. An agency's determination of whether an applicant is the most qualified applicant in a Region and would best serve the interests of that community is a civil proceeding subject to the preponderance of the evidence standard. *See generally V.J.R. Bar Corp. v. Liquor Control Bd.*, 390 A.2d 163, 165 (Pa. 1978) (explaining that the preponderance standard applies to administrative agency decisions). Under its delegated authority, however, the Hearing Examiner's Office is not permitted to determine that an

applicant is entitled to a permit. In fact, the delegated authority *expressly prohibits* the Hearing Examiner from awarding a permit: "The Office of Hearing Examiners is not authorized adjudicate constitutional issues or recommend that the Department issue a permit." The Hearing Examiner does not serve the same role as OMM in determining whether an applicant deserves a permit.[6] It strains credulity, then, to suggest that the Hearing Examiner should have applied the same standard as OMM's determination in the first instance—a decision she was not authorized to make.

As detailed by the rest of OMM's Exceptions, the Proposed Report is completely unsupported by the record evidence and lacks any legal authority to justify its ultimate conclusion. Those legal conclusions are also completely divorced from the proposed Findings of Fact, and they assign legal significance to Keystone's cherry-picked facts suggesting, for example, that there was not enough time to score applications. That is particularly evident in light of the Hearing Examiner's frequent determinations that Keystone failed to present evidence or that it was "impossible" or them to do so. (Proposed Report at 28.) Thus, lacking any legal authority to entertain Keystone's arguments, it appears the Hearing Examiner selected the lowest possible standard of proof to justify her decision. The Hearing Examiner erred and this Tribunal should amend her decision, and accept Keystone's proffered standard: abuse of discretion and capricious disregard of evidence.

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[6] In this case, the Hearing Examiner appears to have seen her role as similar to that of a hearing examiner facing an Order to Show Cause under Section 35.14 of GRAPP, 1 Pa. Code § 35.14. With proceedings under Section 35.14, the agency decision is "deemed to be tentative and for the purpose of framing issues for consideration and decision by the agency in the proceeding." Id. The hearing examiner then makes the final agency determination as to whether or not, for example, a license should be revoked. Of course, here, it is *OMM* that makes the determination for the agency, and the Hearing Examiner sits in an appellate capacity, inappropriate for rendering the decision in the stead of the agency.

IV. *EXCEPTION 4*: The Proposed Report's determinations regarding the time to score applications is unsupported by the record and legally unsound.

The Hearing Examiner's analysis regarding the time that the Evaluation Committee had to score applications should be rejected. Moreover, the Hearing Examiner's conclusion is completely devoid of specificity. "People are human, and people become fatigued," is hardly proof that any problem occurred in the scoring process. (Proposed Report at 30.) Likewise, the determination that "scoring errors were likely made" provides nothing for OMM to contest. (*Id.*) There is no indication of why this would be legally significant, or what errors occurred.

Further, the analysis regarding time finds no support in the facts of record or in the law. Every single witness that testified agreed that the evaluation Committee had enough time to review each application. Keystone cannot cite to any evidence to support its allegation that the Evaluation Committee members did not have enough time to score applications. Rather than reference any facts of record, the Hearing Examiner relies on contentions from Keystone's brief. Keystone's sheer speculation, attempting to calculate the time per page Committee members spent reviewing applications, proves nothing. Of course, in addition to finding no support in the record, the calculation omits the fact that some applications were rejected and that some Committee members only scored certain sections of the applications. There was no testimony outside of McNulty's that demonstrated the amount of time in a day, or days per week that the Committee members worked. The average time spent on applications is a multi-variable determination, and Keystone failed to present evidence on any of those variables. The Hearing Examiner could only consider Keystone's applications. There can be no credible dispute that of consideration Keystone's two applications does not equate to proof regarding the average time spent reviewing all of the other applications.

Even if Keystone presented any conclusive evidence on the amount of time the Evaluation Committee spent scoring the applications, there is no legal authority to suggest what time is permissible. Neither the Proposed Report nor any argument by Keystone cites legal authority to assign significance to the hours spent per application. The mathematical hypotheticals put forth by Keystone are meaningless and, more importantly, utterly fail to consider the urgent need of this treatment. This Tribunal should decline to assign any legal significance to the time the Evaluation Committee spent scoring applications.

V. *EXCEPTION 5*: The Proposed Report makes conflicting determinations regarding the training of the Evaluation Committee.

The Reviewing Tribunal should accept the Proposed Report's determination that the training that OMM provided to the Evaluation Committee was adequate. The Hearing Examiner correctly noted the significance of OMM scoring Keystone's applications separately, and without considering or comparing one another, the difference in scores between the two applications was only 0.6, out of 1,000 total points. As the Hearing Examiner correctly noted, OMM "appears to have accomplished [its] objective" of "promot[ing] a measure of consistency in scoring." (Proposed Report at 27-28.)

The Reviewing Tribunal should reject the other portions of the Proposed Report that undermine that conclusion. For example, despite concluding that the training was adequate, and provided consistent scoring, the Hearing Examiner later criticizes OMM for providing "no specific training or guidance on how to use or award points pursuant to" the Scoring Worksheet.[7]

[7] The structure of the Proposed Report is confusing. It appears that, in an attempt to make sure to address all of Keystone's arguments, the Hearing Examiner frequently recounts Keystone's arguments. In several sections, however, it becomes entirely unclear where Keystone's arguments end and the Hearing Examiner's conclusions begin. That is true of the headings in the Proposed Report as well. For example, while page 25 provides headings such as "Unreasonable Judgment" and "Inadequate Training," on page 27 of the Proposed Report the

(Proposed Report at 32.) Of course, the need to provide such training for an entirely intuitive Scoring Worksheet is undermined by the earlier assertion that OMM succeeded in the training goal of providing consistent scoring.

VI. *EXCEPTION 6*: The Proposed Report makes conflicting determinations regarding the absence of scoring errors by OMM.

Like the conflicting characterizations about the training, the Proposed Report also contradicts itself regarding scoring errors in OMM's scoring. In one instance, the Proposed Report provides that Keystone had the burden to show OMM's scoring was erroneous (Proposed Report at 24); in one instance it provides that "scoring errors were likely made" (Proposed Report at 30); in another instance it provides that Keystone "has not identified a specific scoring error," but that it was impossible to do so (Proposed Report at 28); and in one instance it provides that Keystone did identify scoring errors, albeit without specifying what those "errors" were. (Proposed Report at 36). There is no evidence to support the conclusion that OMM committed scoring errors.

Hearing Examiner concludes that the training was adequate. Similarly, the Proposed Report references, apparently as an argument by Keystone, that Lewis testified that she would not award the maximum Diversity points to applicants that are 100% minority-owned. But it is not clear whether the Hearing Examiner accepted that argument as significant or merely intended to include it as one of Keystone's criticisms of the program. Regardless, to the extent that argument warrants a response, Lewis testified that a 100% minority-owned business would not receive a perfect score because ownership was not the only factor that she considered. She also considered the diversity of an applicant's plans for hiring and subcontracting. (N.T. Lewis, 270:15-271:18, 289:9-13.) Any suggestion by Keystone or the Hearing Examiner that Lewis was precluded from doing so is absurd and impermissibly substitutes Keystone's or the Hearing Examiner's judgments for the discretionary judgments of the Department/OMM. A business could have one percentage of diversity in its start-up phase and a totally different percentage after hiring new employees. Likewise, a business could demonstrate increased efforts to promote diversity by enlisting diverse groups to subcontract with, thus plainly justifying, if not necessitating, Lewis's consideration of additional factors beyond the mere ownership percentage of a business.

The only plausible error that Keystone can cite in support of a scoring error is McNulty's admission that he was mistaken in believing Keystone omitted a security overlay. He acknowledged that Keystone did, in fact, appear to have a security overlay in its application. Ultimately, though, the significance of that acknowledgement must be weighed alongside two other pieces of McNulty's testimony. First, McNulty testified that he did not know exactly what deficiencies in Keystone's applications led to him assigning Keystone a lower score, only that he would testify about what typically caused him to reduce points. Second, the security overlay was in addition to the concerns that McNulty had with Keystone utilizing a third party for its Security and Surveillance. Moreover, McNulty's score was only one of several Committee members. Keystone failed to present sufficient evidence to suggest McNulty's mistaken belief that Keystone lacked a security overlay impacted its overall score. Presumably, and in the absence of any evidence to the contrary, such a mistaken belief would have a negligible impact on Keystone's overall score.

McNulty's acknowledgment of his mistake is insufficient, by itself, for Keystone to meet its burden because it will not overcome the gap between Keystone's score and the top scores for Region 2. Nonetheless, should this Tribunal accept the Proposed Report's determination that Keystone is entitled to a rescore, it should limit that rescore to the Security and Surveillance portion of the application. That is the only portion of the scoring where Keystone can suggest a *potential* scoring mistake was made. Absent a showing that OMM made a mistake in any other part of the application, the score for those sections should remain intact.

VII. *EXCEPTION 7*: The Proposed Report erred in its analysis of OMM's Diversity scoring.

The Hearing Examiner incorrectly assigned legal significance to the process that OMM implemented to score Keystone's Diversity Plan. The importance of diversity, of course, has

been recognized throughout this process. First, the Act itself enshrines the Commonwealth's commitment to fostering diversity:

> *It is the intent and goal of the General Assembly that the department promote diversity and the participation by diverse groups in the activities authorized under this act.*

35 P.S. § 10231.615 (emphasis added). The Act also requires OMM to ensure that the applications for permits encourage applicants to utilize and give consideration to diverse groups for contracting or professional services opportunities. 35 P.S. § 10231.615(3)(b). Thus, to effectuate Section 615(3)(b), the dispensary permit application calls for applicants to provide a Diversity Plan, explaining how it will promote diversity if awarded a permit. The application lists 9 factors that OMM would consider.

Lewis developed the rubric for grading Diversity *based on those 9 factors*. (N.T. Lewis, 267:20-268:4.) The rubric that she developed, like the application above, emphasizes the diversity of the company itself, including management, ownership, and lower level employment. (Ex. D-4b.) The Diversity rubric evaluates the plan to use diverse subcontractors and provide anticipated dollar amounts for those contracts. (*Id.*) The Diversity rubric asks whether the organization plans to use diverse people in leadership roles and whether the organization has an affirmative action policy in place. (*Id.*) The Diversity rubric also inquires whether the applicant's plan describes any outreach initiatives with diverse organizations in the community. (*Id.*) All of these considerations stem *directly* from the 9 factors on the application.

The Proposed Report's criticism of OMM and Lewis because she did not use the Scoring Worksheet is without merit. First, the rubric that she developed for scoring the Diversity Plan provided more detail than the Scoring Worksheet for scoring diversity (though it had a similar five-level grading scale). The Scoring Worksheet merely called for a score for the application's

Diversity Plan. Lewis developing a more detailed rubric for scoring Diversity does not support Keystone's theory of arbitrariness. In fact, the opposite was true—OMM had a thorough process for evaluating the permit applications. And Lewis showed the rubric to OMM during the second day of training and received permission to use it (presumably based on how thorough it was). The rubric came directly from the 9-factor list on the application. Both the application and the rubric were consistent with, and even called for by, the Act.

Likewise, the Proposed Report's criticism of Lewis for using her staff to assist her is hyperbolic. She testified that she received the training from OMM on the Medical Marijuana Program and how to score applications. She was the only one from her Department that provided scores for applications to OMM. Her use of her staff to assist her with the task and their training on the subject are both immaterial. There is no evidence to suggest that her use of her subordinates in any way resulted in an error in scoring or resulted in any other problem in scoring.

Nor was her use of her staff an outrageous breach of confidentiality, as the Proposed Report suggests. There is no evidence to support the notion that any outside party learned information from OMM as a result of Lewis seeking help from her office. Rather, much like any law office, Lewis simply sought assistance for a major project. There is no breach of confidentiality when an attorney uses clerks, paralegals, or other administrative staffers to help on a client's case. There likewise was no breach of Keystone's confidential or propriety information in this case. The Proposed Report's chastisement of Lewis for enlisting help is overblown and does nothing to provide Keystone a right to a rescore.

VIII. *EXCEPTION 8*: The Proposed Report erred in determining that OMM considered criteria in addition to or contrary to the Medical Marijuana Act and Temporary Regulations.

For some reason, the Hearing Examiner concluded that using Act 47 status was in addition to or inconsistent with the Act or Regulations. But the use of Act 47 municipalities as a scoring metric is not an additional factor to which applicants had no notice; rather, it is the codified outer limit of a factor that was known to applicants. The Scoring Methodology portion of the Application Instructions and Section 1141.24 of the Temporary Regulations—both of which were available to applicants before the submission deadline—provided that the Department will consider the impact on "Areas of *recognized* need for economic development." 28 Pa. Code § 1141.24(b) (emphasis added).

By definition, "financially distressed" municipalities under Act 47 are areas of legally recognized need for economic development. Act 47 authorizes a municipality to petition for a determination of financially distressed status and for the Governor to declare a fiscal emergency in distressed municipalities. 53 P.S. §§ 11701.202, 11701.203, 11701.602. Act 47 even defines a "Distressed municipality" as a "municipality which has been determined to be financially distressed" under Section 203. 53 P.S. § 11701.203. Act 47 financially distressed municipalities are not just areas of recognized need for economic development; they are recognized *by statute* as areas in need for economic development.

Thus, it was perfectly rational, and far from arbitrary, for OMM to determine that Act 47 municipalities would garner a top score for Site Selection. Act 47 municipalities are unobjectionably accepted locations in need of economic assistance. Using Act 47 financially distressed municipality status provided an objective manner for the DCED Committee members to determine whether the Site Selection of a proposed dispensary will have a "positive impact on

the community." Contrary to the Hearing Examiner's determination, using Act 47 is completely consistent with the Act and Regulations.

Similarly, the Hearing Examiner erred in assigning legal significance to the fact that Community Impact scoring rubric used local unemployment as a metric for scoring. The Hearing Examiner criticized such use, seemingly calling it a "scoring error[]" because OMM did not notify applicants that it would consider unemployment. (Proposed Report at 36.) This point by the Hearing Examiner should be rejected for three reasons.

First, the Hearing Examiner again implies that considering local unemployment is inconsistent or in addition to the criteria that applicants should have expected to be considered. It is not. The DCED Committee members were tasked with evaluating whether awarding an applicant a permit to start a new business will have a "positive impact on the community." (N.T. McNulty, 244:22-25.) Such an assessment naturally implicates the new business's impact on a community's employment. Considering job creation and the need for employment—by way of unemployment statistics—is perfectly consistent with the task of assessing community impact. Keystone cannot claim that it was surprised or unfairly disadvantage by such a scoring metric.

Second, the use of unemployment statistics provides an objective and numerical way to evaluate community impact. The rubric provided that applicant locations with an unemployment rate 25% or greater than the state average would receive full points; locations with an unemployment rate between 1% and 24% greater than the state average would receive up to two-thirds of the total points; and locations with an unemployment rate below the state average would receive up to one-third of the total points. It is curious that Keystone, who has made repeated allegations of arbitrary grading, would argue that consideration of *numerical statistics* was somehow impermissible.

Third, the Hearing Examiner confusingly deems the use of unemployment statistics to be "scoring errors." (Proposed Report at 36.) There is no evidence on record that suggests any error took place. Keystone did not present any evidence or elicit any testimony to question the calculations by OMM. Nor can Keystone cite to any evidence that its Community Impact should have received a higher score. Instead, Keystone merely complains that OMM acted unreasonably by considering the community's need for development and job creation. It strains credulity to argue that the Commonwealth may not consider the economic impact on a local community.

Relatedly, the Hearing Examiner erred by concluding that OMM did not have the authority to fill in statutory or regulatory gaps relating to scoring. Doing so was expressly authorized by the Act because OMM was tasked with the large responsibility of administering the program. Section 602(a) provides that applications for permits "prescribed by the Department...shall include, inter alia, [a]ny other information the [D]epartment may require." 35 P.S. § 10231.602(a). Section 603(a.1) provides that in making determinations as to whether to grant or deny permits, "the [D]epartment shall determine that...[t]he applicant satisfies any other conditions as determined by the [D]epartment" and "shall consider...[a]ny other factor the [D]epartment deems relevant." 35 P.S. § 10231. 603(a.1). Thus, the Hearing Examiner finding error where, for example, McNulty expressed the preference for capital to be liquid ignores the express authority granted to OMM by the General Assembly.

IX. *EXCEPTION 9*: The Proposed Report's Conclusions of Law 5 and 6 are erroneous.

Conclusion of Law 5 purports that there were "[s]ignificant errors and irregularities, contrary to the Act and the Departments [T]emporary [R]egulations" that occurred during the scoring of Keystone's applications. (Proposed Report at 20-21.) Yet nowhere in the Proposed

Report does the Hearing Examiner explain what "errors" occurred, or that OMM acted in any way "contrary" to the Act and Temporary Regulations. This Conclusion is completely unsupported by the record. As explained above, OMM actions were perfectly in line with the Act and Temporary Regulations, not contrary to them. Likewise, Keystone cannot identify a single error by the Evaluation Committee that, if remedied, would result in a higher score for Keystone. The Reviewing Tribunal should reject this Conclusion.

Similarly, Conclusion of Law 6 purports that Keystone met its burden of proof. Absent any witness or piece of evidence, somehow, the Hearing Examiner concluded that Keystone met its burden. To do so, Keystone must demonstrate that the Department abused its discretion in denying Keystone a permit. This Tribunal should reject the Hearing Examiner's final conclusion.

X. *EXCEPTION 10*: The Hearing Examiner's Office exceeded its delegated authority.

Despite reciting the authority delegated to the Hearing Examiner's Office bestowed to it by the Deputy Secretary, the Proposed Report exhibits a total disregard for that authority. The Hearing Examiner has no jurisdiction to evaluate, or opine upon, the adequacy of the remedy of rescoring Keystone's application. In fact, a determination that the administrative remedy is inadequate was expressly *excluded* from its delegated authority, which provides that the Hearing Examiner is "not authorized to adjudicate constitutional issues." Likewise, the Hearing Examiner has no authority to order or recommend that the Department promulgate Regulations to remedy the adequacy of the remedy (which, again, she has no authority to assess in the first place).[8] The Hearing Examiner's analysis about the adequacy of rescoring Keystone's

[8] Regardless, at the time of the issuance of the Proposed Report, that the Department had already promulgated Temporary Regulations to allow for the award of additional permits should

applications bears directly on the constitutionality of the medical marijuana program. That determination cannot be made by a Hearing Examiner. Thus, the Proposed Report and Proposed Order require this Tribunal to remind the Hearing Examiner's Office of its proper function within the Department of Health.

CONCLUSION

Keystone demands that it receive a permit for Region 2, a region where its dispensary permit applications placed 20th and 21st. Despite failing to provide a single shred of evidence at its administrative appeal hearings, Keystone somehow contends that it is entitled leapfrog the 16 applicants ahead of it to be placed in the top four applications. This, of course, is folly.

The General Assembly tasked the Department and OMM with devising a program that ensures permits are awarded to the highest quality applications that could safely and securely provide medical marijuana treatment to patients desperate for relief. At all times faithful to the Act and Temporary Regulations, OMM has done just that. OMM properly exercised its discretion afforded it by the General Assembly in developing the permit application and accompanying documents, training the scorers, and scoring the permit applications. Rather than present evidence of any impropriety, Keystone challenges OMM's discretionary acts such as considering municipalities in dire need of economic development.

Respectfully Submitted,

ELLIOTT GREENLEAF, P.C.

Date: November 29, 2018

/s/ Jarad W. Handelman
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such permits be required by the order of a court, at the recommendation of the Medical Marijuana Advisory Board.

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

KEYSTONE RELEAF, LLC **Appellant,** **v.** **PENNSYLVANIA DEPARTMENT OF HEALTH, OFFICE OF MEDICAL MARIJUANA,** **Appellee.**	**No. MM 17-095 D** **No. MM 17-096 D**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Office's Brief on Exceptions was served this 29th day of November, 2018, via electronic mail, on the following:

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